No. 80-323

IN THE

Supreme Court of the United States

October Term, 1980

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al. IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in determining that, because CBS had the real choice of dealing either with ASCAP or directly with ASCAP's members, CBS failed to prove any facts sufficient to support its claim under Section 1 of the Sherman Act?

TABLE OF CONTENTS

PAGE

Question Presented i

Statement Of The Case 1

The Parties 1

CBS 1

ASCAP 2

Prior Proceedings 3

The District Court 3

The Court of Appeals—1977 4

This Court's Prior Decision 5

The Court of Appeals—1980 6

Reasons For Denying The Writ 7

I. The Narrow Factual Holding Of The Court Below On Remand Presents No Question Of General Importance Warranting Review By This Court 7

II. The Decision Below Does Not Conflict With Decisions Of Other Circuits 8

III. The Decision Below Does Not Conflict With The Mandate Of This Court 8

Conclusion 10

TABLE OF AUTHORITIES

CASES:

United States v. *ASCAP*, [1950-51] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) 2

STATUTES:

15 U.S.C. § 1 i

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STATEMENT OF THE CASE

The Parties*

CBS

Although petitioner Columbia Broadcasting System, Inc. ("CBS") engages in many broadcast and other activities, the ruling below concerns only the television network operated by CBS. Indeed, it concerns the operation of that network only to the extent that the network is legally re-

* A full description of the parties appears in this Court's earlier opinion in this case. (C-3-4.) [References are to the appendix to the petition for a writ of certiorari.]

quired to acquire performance rights to copyrighted musical compositions to avoid being an infringer.

ASCAP

The American Society of Composers, Authors and Publishers ("ASCAP") and its members offer CBS the opportunity to acquire music performance rights.

ASCAP is an unincorporated association of creators and publishers of music; it acts as a clearinghouse for the licensing of performance rights to the copyrighted music of its 16,000 writer and 6,000 publisher members.*

Under the Amended Final Judgment entered on consent in 1950 in *United States* v. *ASCAP,* [1950-51] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) (amending a 1941 judgment), ASCAP is required to offer users, including the CBS television network, the "blanket" license which gives the user the right to perform all of the compositions in the ASCAP repertory, as often as desired, upon payment of a stipulated fee.

Blanket licenses are used throughout the world by performance rights societies in all countries which recognize copyright. The prime virtues of the blanket license are convenience, limitless choice in performing both existing music and music created during the license term, and freedom from concern about infringement. It gives the CBS television network, for example, unlimited access to all the copyrighted compositions written or published by members of the licensing society and of affiliated foreign societies—without the need to seek licenses from individual copyright owners.

However, if CBS desires to seek licenses from individual copyright owners, it is free to do so. Under the Amended Final Judgment, the ASCAP Articles of As-

* ASCAP also licenses on behalf of the hundreds of thousands of members of some 30 affiliated foreign societies which, similarly, license for ASCAP members in their countries.

sociation and the membership agreements, each member grants to ASCAP only the *nonexclusive* right to license performances. The member retains the right to license directly. ASCAP does not, and cannot, interfere with that right.*

Hence, CBS, in obtaining music performance rights, has complete freedom of choice—it is not restrained. It may deal with ASCAP, or it may deal with ASCAP's members.

Prior Proceedings

The District Court

In the District Court, however, CBS contended that it had no such choice. Although CBS had never approached even one ASCAP member for a direct license, it sought to prove that any such effort would be futile since ASCAP members would refuse to license directly. Accordingly, CBS argued that the blanket license should be condemned as block-booking, price-fixing and an unreasonable restraint of trade.

The principal factual issue tried before the District Court was whether CBS, as a practical matter, could obtain the licenses it desired directly from ASCAP's members. The evidence at trial destroyed CBS' factual contentions. The District Court's findings of fact established that CBS *could* acquire the licenses it wished in direct negotiations with ASCAP members and that ASCAP's members *would* compete on a price basis for individual compositions if CBS sought direct licenses from them.

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* Virtually every other aspect of ASCAP's operations is governed by the Amended Final Judgment. For example, no user may be denied an ASCAP license. And ASCAP's fees for all of its licenses are regulated by the Amended Final Judgment—if a user is dissatisfied with a fee quoted by ASCAP and an agreement cannot be negotiated, the user has the right to have the District Court for the Southern District of New York determine a "reasonable fee."

Those District Court findings, after an eight-week trial held in 1973, were explicit (E-88-89, 92):

> "CBS has [not] . . . established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license.
>
> * * *
>
> ". . . CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them."

Turning to the legal issues, the District Court concluded that CBS' claims of antitrust illegality—*per se* or otherwise—could not be sustained. Since there was no compulsion in the blanket license which ASCAP made available to the CBS television network, and since CBS had a free and real choice between dealing with ASCAP and dealing with the individual members, the District Court dismissed the complaint.

The Court of Appeals—1977

On CBS' appeal from the District Court's order, the Court of Appeals accepted every finding of fact made by the District Court in its 46-page opinion. But a majority of the Court of Appeals (Gurfein and Anderson, JJ.) held that the mere offering of a blanket license by ASCAP—even though ASCAP's members were willing to deal individually and even though ASCAP was required to offer blanket licenses by the Amended Final Judgment—was an act of price-fixing as a matter of law, and so illegal *per se*. Judge Moore, in an opinion termed a concurrence, did not agree that the blanket license was price-fixing.

Judge Gurfein's opinion correctly noted that (D-3):

> "In dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis.*"

This Court's Prior Decision

On ASCAP's petition, this Court granted certiorari (C-6) and reversed the judgment of the Court of Appeals.

Noting with regard to the blanket license that "[we] have never examined a practice like this one before" (C-9), Justice White's opinion for the Court concluded (C-20):

> "The blanket license, as we see it, is not a 'naked restrain[t] of trade with no purpose except stifling of competition,' *White Motor Co.* v. *United States,* 372 U.S. 253, 263 (1963), but rather accompanies the integration of sales, monitoring and enforcement against unauthorized copyright use."

This Court accepted the concurrent findings of fact of the lower courts on the network's freedom of choice (C-11-12, 24):

> "It . . . remains true that the decree [Amended Final Judgment] guarantees the legal availability of direct licensing of performance rights by ASCAP members; and the District Court found, and in this respect the Court of Appeals agreed, that there are no practical impediments preventing direct dealing by the television networks if they so desire. Historically, they have not done so.
>
> * * *
>
> "The District Court found that there was no legal, practical or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice."

The case was remanded to the Court of Appeals (C-25)

> "to consider any unresolved issues that CBS may have properly brought to the Court of Appeals. Of course, this will include an assessment under the rule of reason of the blanket license as employed in the television industry, if that issue was preserved by CBS in the Court of Appeals.

The Court of Appeals—1980

On remand, the Court of Appeals determined unanimously that, as a factual matter, CBS had failed to prove that it had been restrained.*

After noting that "[t]he entire trial in the District Court concerned primarily the issue of whether direct licensing was feasible" (A-14), the court quoted Judge Lasker's express finding that (A-14)

> " 'CBS has failed to prove the factual predicate of its claims—the nonavailability of alternatives to the blanket license . . .' "

The court then held (A-14):

> "That ultimate finding is abundantly supported by subsidiary findings and by the record, which completely refute all of CBS's allegations of barriers to direct licensing."

With the record below in this state, the court upheld dismissal of CBS' complaint, concluding (A-11):

> "[A] practice that is not a *per se* violation, and this blanket license has authoritatively been found not to be such, does not restrain trade when the complaining customer elects to use it in preference to realistically available marketing alternatives."

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* The court's opinion was written by Judge Newman who was assigned to the panel after the death of Judge Gurfein. Judge Lumbard was assigned to the panel after the death of Judge Anderson, leaving only Judge Moore from the prior panel.

REASONS FOR DENYING THE WRIT

I.

The Narrow Factual Holding Of The Court Below On Remand Presents No Question Of General Importance Warranting Review By This Court.

The Court of Appeals did not decide an important question of federal law that requires further review. The Court of Appeals held only that the record provided more than ample support for the District Court's findings of fact that CBS chose the blanket license in preference to realistically available marketing alternatives—to wit, direct licenses from ASCAP's members. Having made that choice, both lower courts agreed, CBS could not claim that it was restrained by the blanket license.

By upholding the District Court's findings of fact, the Court of Appeals did no more than reaffirm its earlier ruling in such respect, a ruling accepted in Mr. Justice White's opinion for this Court. Grant of CBS' petition would require this Court to review a mass of evidentiary detail to determine the sufficiency of findings of fact left undisturbed at each of the three prior appellate reviews of this case.

Unlike the 1977 decision of the Court of Appeals, which did serious mischief to the antitrust laws by misapplying the *per se* doctrine, the decision now sought to be reviewed involved only narrow factual issues based on a particular record and a particular plaintiff.

The decision below does no mischief and creates no turmoil. It involves only a failure of evidentiary proof. Deciding no novel, general or important legal issues, the court held simply that CBS failed to prove the facts supporting the allegations of illegal conduct made in its complaint.

This suit by a single network that failed to prove its case is an inappropriate vehicle for any further review by this Court of the function and effects of the blanket license offered to music users. Ample means exist for consideration and resolution of issues concerning the licensing of performance rights to copyrighted music. Mr. Justice White's opinion pointed out that (C-12):

> "[T]he Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the [consent] decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anti-competitive practices."

II.

The Decision Below Does Not Conflict With Decisions Of Other Circuits.

Although CBS asserts in its statement of the questions presented that the decision below conflicts with decisions of other circuits, the text of the petition fails to demonstrate, or even discuss, any such conflict. Obviously, in view of the narrow and limited factual nature of the holding below, there is no conflict.

III.

The Decision Below Does Not Conflict With The Mandate Of This Court.

The Court of Appeals was directed on remand "to consider any unresolved issues that CBS may have properly brought to the Court of Appeals," including "an assessment under the rule of reason of the blanket license as employed in the television industry." (C-25.)

The Court of Appeals made such an assessment. It concluded, relying on previously undisturbed findings of

the District Court, that CBS simply failed to prove its case under an appropriate rule of reason analysis—where the primary inquiry is, of course, into the nature and competitive effect of the alleged restraint. That is what the District Court did here and the Court of Appeals upheld.

CBS' grievance, if any, derives from the factual weaknesses of its case, not from any justified objections to the legal rulings made by the court below.

Indeed, it would appear that CBS' real quarrel is with the prior decision of this Court. The petition, for example, seeks to equate ASCAP with any horizontal arrangements among competitors—"all steel companies could pool their outputs and jointly sell requirements contracts to each customer at prices set by an industry-wide committee." (Petition at 19.) But this Court has already said that (C-24)

> "[T]he blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license but that license is quite different from anything any individual owner could issue. The individual composers and authors have not agreed either to sell individually in any other market or to use the blanket license to mask price fixing in such other markets. Moreover, the substantial restraints placed on ASCAP and its members by the consent decree should not be ignored. The District Court found that there was no legal, practical or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice."

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
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